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April 29, 1994

Mr. William F. Caton
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 93-107
Channel 280A
Westerville, Ohio

Dear Mr. Caton:

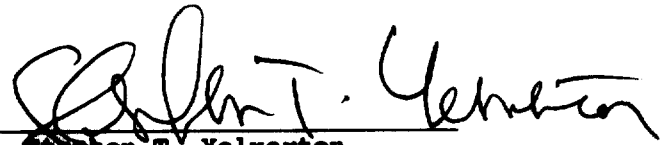
Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and eleven (11) copies of its "Opposition to Motion to Strike."

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By:


Stephen T. Yelverton

Enclosure

B:CATON.139

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of:

DAVID A. RINGER

et al.,

Applications for Construction
Permit for a New FM Station,
Channel 280A, Westerville,
Ohio

MM Docket No. 93-107

File Nos. BPH-911230MA

through

BPH-911231MB

To: The Review Board

OPPOSITION TO MOTION TO STRIKE

Respectfully submitted,

MCNAIR & SANFORD, P.A.

By:

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April 29, 1994

B:CATON.139

OPPOSITION TO MOTION TO STRIKE

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Section 1.294 (b) of the Commission's Rules, hereby submits this "Opposition to Motion to Strike." On April 6, 1994, ORA filed a supplement to a motion to enlarge the issues against Shellee F. Davis ("Davis"). On April 20, 1994, Davis filed a motion to strike. In opposition to Davis' motion, ORA submits the following comments.

Davis previously disclosed during discovery in this proceeding that she had received a purported tower site agreement in December 1991 from Mid-Ohio Communications, Inc. A December 1991 letter from Mid-Ohio states in pertinent part that it is "willing to negotiate" and has an "intent to negotiate" with Davis as to use of its transmitting tower and facilities.

In a March 28, 1994, submission, Davis disclosed a letter from Mid-Ohio, dated March 2, 1994. Therein, Mid-Ohio confirmed that its December 1991 letter was only a "willingness to negotiate" as to a "possible" lease of the tower site. ORA thus contended in its April 6, 1994, supplement that, under applicable Commission policy, Davis never had "reasonable assurance" of her proposed tower site.

Davis apparently takes umbrage as to this recent attack on her tower site qualifications and demands that the supplement be stricken as somehow defective and untimely. However, she is not clear or coherent as to how ORA's supplement is defective and untimely.

Davis appears to characterize the supplement as a petition for reconsideration of the ALJ's June 24, 1993, denial of ORA's motion to enlarge the issues as to her tower site qualifications. However, the supplement is a means to apprise the Board as to new facts bearing on that tower site issue, which is now before Board in ORA's exceptions, filed December 20, 1993.

Davis next contends that ORA's exceptions have not been properly supplemented because the April 6, 1994, supplement is an incorporation by reference into the exceptions. Davis bases this convoluted argument on Nuance Corp., 47 RR2d 1405 (Rev. Bd. 1980). However, that decision rested on entirely different facts. In any event, the Board granted the applicant leave to

supplement its exceptions. ORA hereby requests such leave, if the Board believes that a re-submission is necessary.

Davis questions the "good faith" of filing of the supplement because she disagrees with the arguments made by ORA. However, contrary to Davis' claims, the supplement is well-grounded in both the facts and the law.

Davis also contends that the supplement is in violation of Section 1.49 (a) of the Rules, but fails to identify which aspect of that multi-part provision ORA is in violation. It may be that Davis believes that the type size on the supplement does not meet Commission requirements. However, the pleading is in 12-point type, which is permissible under Section 1.49 (a). In any event, the supplement is well within any page limitations imposed by Commission. Therefore, ORA has not attempted to evade page limitations requirements by using small type size and thus Davis has not been prejudiced.

Davis devotes much of her motion to strike to making the same substantive arguments as in her opposition to the supplement, filed April 20, 1994. In both pleadings, she focuses upon Elijah Broadcasting Corp., 68 RR2d 205, 207, para. 10 (1990), for the proposition that the Commission has a liberal standard for "reasonable assurance" of a proposed tower site.

However, Davis ignores the Commission's more recent decision in National Communications Industries, 7 FCC Rcd 1703, para. 2 (1992), which affirmed the Board's decision in 6 FCC Rcd 1978, 1979, para. 10 (Rev. Bd. 1991). Therein, the Board held that "reasonable assurance" of the availability of a tower site requires more than a vague "willingness to deal" on the part of the site owner, citing Progressive Communications, Inc., 3 FCC Rcd 5758, 5759, para. 9 (Rev. Bd. 1988).

Accordingly, the March 2, 1994, letter from Mid-Ohio unequivocally confirms that its understanding of its relationship with Davis was merely a "willingness to deal" in the future. This is insufficient under established Commission policy.

WHEREFORE, in view of the foregoing, ORA requests that Davis' motion to strike be denied as procedurally and substantively without any merit.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 

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April 29, 1994

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CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 29th day of April, 1994, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Opposition to Motion to Strike" to the following:

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*Hand Delivery